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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 287

SUDAMETAL SOCIEDAD ANONIMA SUD AMERICANA DE METALES Y MINERALES, ALSO KNOWN AS SUDAMETAL, S. A.,

Petitioner,

vs.

THE UNITED STATES,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES

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Petitioner,

vs.

THE UNITED STATES,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES

To the Honorable The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Sudametal Sociedad Anonima Sud Americana De Metales Y Minerales, also known as Sudametal, S. A., the petitioner herein, prays that a writ of certiorari issue to the Court of Claims of the United States to review a judgment entered by that Court in the above-entitled cause on June 5, 1950.

Findings and Opinion Below

This cause originated with the filing of a petition to recover just compensation for tin owned by petitioner which

was requisitioned by the Navy Department on behalf of the United States (R. 1).

After hearings before a Commissioner of the Court of Claims, the Commissioner submitted a report of his findings of fact in which he rejected the petitioner's claim of $97,774.24 (being $97,983.44 less New York storage costs of $209.20) and instead allowed a fair value of $29,685.22, plus interest, as just compensation for the 54,180 pounds of requisitioned tin. Exceptions to this report were filed by both petitioner and respondent. After argument before the Court of Claims, it handed down its decision on February 6, 1950 affirming the award of the Commissioner. Thereafter, respondent made a motion for a new trial which was opposed by petitioner. Thereafter, the Court of Claims on the basis of this Court's decision in the case of *The United States* v. *Commodities Trading Corporation,* 339 U. S. 129, vacated its prior judgment entered on February 6, 1950, and entered a new judgment on the 5th day of June, 1950, awarding the petitioner just compensation in the sum of $28,715.40 with interest (R. 19-20).

Jurisdictional Statement

The jurisdiction of this Court is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 928, U. S. C. Title 28, Sec. 1255.

Statute Involved

This case arises under that part of the Fifth Amendment to the Constitution which provides that private property shall not be taken for public use without just compensation, the Act of July 2, 1940, 54 Stat. 714, as amended, and the Act of October 10, 1940, c. 836, 54 Stat. 1090, as amended by the Act of July 2, 1942, c. 471, Sec. 1, 56 Stat. 467, 50 U. S. C. App. Secs. 701, 711 and 712 (Sup. 1946). (The relevant portions of the latter statutes are set forth in an

appendix to the brief in support of this petition.) The jurisdiction of the Court of Claims was based upon Sec. 145 of the Judicial Code (Act of March 3, 1911, c. 231, Sec. 145, 36 Stat. 1136, as amended by the Act of June 10, 1921, c. 18, Sec. 304, 42 Stat. 24, 28 U. S. C. Sec. 250). (The latter statute was repealed by the Act of June 25, 1948, c. 646, Sec. 39, 62 Stat. 992, effective September 1, 1948, U. S. C. Title 28, Sec. 1491.)

Summary Statement of the Case

The question presented for decision is one never directly decided by this Court. It is whether, under the Constitution and decisions of this Court and foreign tribunals in comparable factual situations, petitioner, whose tin was requisitioned by respondent, is entitled to the market value of its tin in Buenos Aires, Argentina, its intended and expressly stated destination under a through bill of lading, and *not* the market value in the United States, where the goods were found en route to Argentina on a through bill of lading from Singapore to Buenos Aires, via New York (R. 21-23, 33; Defendant's Ex. 13-A (enclosure A, R. 66A)). Petitioner, admittedly, never entered the tin through our Customs Service, made no effort or expressed any intention so to do, and did not consent thereto. On the contrary, the tin was entered through our Customs Service by *Respondent* for its own benefit and purposes after it was placed in storage on a General Order issued by the United States Customs Service (R. 24 (9Q-14Q inclusive); 26; 29 (26Q-27Q inclusive); 29 (28Q-30Q inclusive); 35; 36 (RDQ60-64 inclusive); Plaintiff's Exhibits 1-5 inclusive; Defendant's Exhibits 13A and 13B).

The Court of Claims by its amended judgment of June 5th, 1950 allowed the petitioner 53¢ per pound for the requisitioned tin, which was the price fixed by the Office of Price Administration. Petitioner claims it is entitled to approxi-

mately $1.83 per pound, the market price of tin in Buenos Aires, Argentina, established by the testimony of witnesses taken on written interrogatories and cross-interrogatories. (The latter testimony was not considered by the Court of Claims which deemed it immaterial.) (R. 8, F. 12.)

There is no dispute as to the material facts upon which this Court is to determine whether petitioner is entitled to the relief prayed for herein.

Petitioner was incorporated under the laws of the Republic of Argentina on or about June 6, 1939, and has continued such corporate existence. Its principal place of business is located in Buenos Aires, Argentina, and it never had a corporate office in the United States (R. 5).

On or about November 15, 1941, petitioner purchased 982 slabs of refined Grade A tin from Henry Waugh & Company, Ltd. of Singapore, payment to the latter being made by means of a letter of credit opened by the petitioner with the Swiss Bank Corporation of England. The average price for the entire quantity of tin so purchased is 56.23 cents a pound (R. 6).

The tin was initially shipped from Singapore to petitioner in Buenos Aires, Argentina, via New York City, on the steamer *Lillian Luckenbach*. A through bill of lading dated at Singapore November 15, 1941, covering the shipment was issued to the petitioner and it read, "From Singapore to Buenos Aires via New York." The *Lillian Luckenbach* would normally have unloaded the tin in New York for reshipment to Buenos Aires on another vessel (R. 6; R. 23).

A marine disaster necessitated that the entire cargo of tin be unloaded from the *Lillian Luckenbach* at Surabaya, East Indies. Subsequently the steamer *Collingsworth* picked up only 523 slabs of the tin. The *Collingsworth* arrived in the Port of New York on May 4, 1942, where she

unloaded the 523 slabs of tin weighing a total of 54,180 pounds (R. 6). The tin remained on the docks from May 4th to June 2nd and 3rd, 1942, on which dates it was delivered to Bowne-Morton Stores, Inc., 611 Smith Street, Brooklyn, New York, for storage under General Order 13292 issued by the United States Customs Service (R. 6. 7).

Shortly after the tin was unloaded from the *Collingsworth* petitioner requested the New York Trust Company to aid it in securing the dispatch of the tin to Argentina. That company attempted to make an "intransit" entry of the tin through Customs to permit its movement from one pier to another for such dispatch, and then learned that an export license would be required before the tin could be shipped to Argentina. Petitioner then sought the assistance of Mercantile Metal & Ore Corporation, import and export merchants in New York City. That company, on petitioner's behalf, filed two separate applications for an export licenses to Argentina for portions of this tin, one on August 18 and the other on August 31, 1942. Each of these applications was rejected on the ground that the proposed "exportation" would be contrary to the interests of the national defense (R. 7).

On or about September 10, 1942, respondent, acting through the Navy Department, requisitioned and took possession of the 523 slabs of tin weighing 54,180 pounds. Thereafter and on or about September 18, 1942, this tin was released from the bonded warehouse and entered through Customs by respondent (R. 7, 37, 38, 39, 40). The Navy Department prior to the requisition was aware of the fact that the tin was an "intransit" shipment, destination Buenos Aires (Defendant's Exhibit 13-A); (Plaintiff's Exhibit 6).

Prior to the entry of the tin by the United States the following steps were taken by it or in its behalf:

On September 18, 1942, American Mail Line, Ltd. (owner of the *Collingsworth*), upon the order and direction of the respondent, issued a carrier's certificate for the 523 slabs of tin by Transport, Trading and Terminal Corporation, the former's agent, to Howard Fyfe, United States Dispatch Agent, who was designated as consignee of said tin by the respondent (Plaintiff's Ex. 1).

On September 18, 1942, the United States Dispatch Agent released to the United States Navy Department the 523 slabs of tin (Defendant's Ex. 13-B).

Petitioner did not consent to or acquiesce in the requisition and the taking of the 523 slabs of tin by respondent through its Navy Department (R. 40). The Customs entry was not for the account of petitioner. Petitioner did not desire or intend that the tin be entered, nor did it ever take any steps or make any effort to enter the tin through the United States Customs Service as part of the commerce of the United States (Plaintiff's Exhibits 2-5 inclusive; R. 24 (9Q-14Q inclusive); 26; 29 (26Q-27Q inclusive); 29 (28Q-30Q inclusive); 35; 36 (RDQ60-64 inclusive). Petitioner, by its application for an export license, did not intend, admit or concede that it was an application for export of goods previously imported into the United States by it (R. 39).

On March 6, 1943, petitioner filed with the Navy Department a claim for fair and just compensation, for 53,783 pounds of tin, later amended to 54,180 pounds, which were actually requisitioned. Petitioner demands just compensation for the latter quantity of tin (R. 8).

Petitioner, claiming to be entitled to be placed in as good a position as it occupied before the requisition, sues for just compensation predicated on the market value of this

tin in Buenos Aires, Argentina, where there was a market for the commodity. During September and October, 1942 at or about the time the tin was requisitioned by respondent, the average market value of tin in Buenos Aires, Argentina was 17 pesos per kilo (the equivalent of $1.83 per pound). At the latter price petitioner claims $97,983.44 (R. 8, 9).

On April 9, 1943 respondent, acting through the Navy Department, made what it termed a "preliminary determination" of the value of the tin which was requisitioned, this determination being in the amount of $28,173.60, plus interest at 4 per cent per annum to the date of the determination, totaling $28,825.06, which was arrived at on the basis of the price fixed by the Office of Price Administration, to wit, 52¢ per pound (R. 9).

On September 9, 1943, petitioner filed a written objection to the preliminary determination on the ground that the determination did not constitute fair and just compensation for the tin requisitioned in that the petitioner was entitled to an award based on the market value of tin in Buenos Aires, Argentina as of the date when requisitioned (R. 10).

On May 2, 1944, the Navy Department paid to petitioner the sum of $14,412.53, this being 50% of the determination made by the Navy Department, which the petitioner accepted, reserving its right to assert a claim against the United States for fair and just compensation (R. 10).

The decision of the Court of Claims and the judgment entered thereon can be justified only on the footing that it assumed as a fact that petitioner's tin had a business situs in the United States at the time when it was requisitioned or that petitioner was subject to the jurisdiction of this country. The first assumption is contrary to the admitted facts which establish that petitioner shipped its tin on a through bill of lading from Singapore via New York to Buenos Aires, Argentina and never intended or ever made

any effort to enter the tin into the United States so that it should become part of its commerce. On the contrary, it is admitted, and the record so establishes, that the tin was entered on a consumption entry by *respondent*. The second assumption would be contrary to law for the Court of Claims found that the petitioner maintained no office in the United States (R. 5).

The grounds of the decision by the Court below represent, by necessary implication, a departure from the principles of law heretofore applied by this Court in cases having analogous factual situations. The decision is contrary to the holdings of the English Courts in like situations and diametrically opposed to those of international tribunals upon like facts. The imposition of price control upon a friendly neutral not subject to our jurisdiction, whose goods are here in transit, is without precedent in our jurisprudence.

This unusual basis of determining just compensation is of importance not only in the instant case but also in other cases arising from requisitions during the war. Because of its applicability to property of nationals of foreign countries, the decision takes on an added significance in that there is involved a question of international relations which have their impact on our economy. Nationals of foreign countries might well hesitate to ship merchandise through our ports to other countries if to do so would subject them and their merchandise to our laws notwithstanding the merchandise was never entered or intended to be entered through our Customs Service so as to become part of our commerce.

Questions Presented and Specifications of Errors

The questions presented in relation to the errors claimed to have been committed by the Court of Claims, and which are intended to be urged by petitioner, are as follows:

1. Do fiat prices, established by the Exective through the medium of the Office of Price Administration, have application to a nonresident friendly alien whose goods, not entered as part of our commerce and here in transit only, were requisitioned by the Executive acting through the NavyDepartment?

2. Having interrupted the passage of commodities, by requisition, from a nonresident friendly alien, is not the measure of fair and just compensation payable by the United States the market value of the commodities at the place of destination, the residence and domicile of the alien?

The Specifications of Errors Are as Follows:

3. Petitioner contends that the Court of Claims erred in that it failed to give due consideration to the admitted fact that petitioner's tin had no business situs in the United States because petitioner, the designated consignee in Buenos Aires, Argentina, never intended to nor did it enter and import its tin into the United States so as to become part of its commerce.

4. The Court of Claims erred since its decision is predicated upon the assumption of fact that petitioner's tin had a business situs in the United States, which assumption is contrary to the record facts.

5. Petitioner contends that the Court of Claims erred in failing to fix just compensation on the basis of the market value of the tin in Buenos Aires, Argentina, its admitted and intended ultimate destination, and compensation should

have been awarded under the well-settled principle of "mobilia sequuntur personam."

6. Petitioner contends that the Court of Claims erred in awarding it compensation for its requisitioned tin on the basis of prices fixed by the Office of Price Administration because the pertinent statutes and regulations specifically exempt petitioner's tin from the application. The tin was shipped to petitioner as consignee on a through bill of lading from Singapore to Buenos Aires, Argentina, via New York, as a point of transshipment to its ultimate destination without "entry" of the tin through the United States Customs Service and petitioner made no "importation" thereof.

Reasons for Allowance of Writ

Petitioner's application for a writ of certiorari should be granted because there is presented a question of constitutional and international law heretofore not considered and decided by this Court on the basis of the admitted record facts, to wit:

> Whether the goods of an alien friend never entered as part of our commerce, temporarily here pending trans-shipment, may be subjected to seizure and requisition to be compensated at fiat prices established by the Executive.

An important and substantial constitutional question is presented, which should be resolved by this Court, to wit,—whether requisitioned personal property of nonresident foreign nationals, within our jurisdiction temporarily while in transit, not imported or entered into the United States, not part of our commerce or in competition therewith, is to have its just compensation measured by our O. P. A. prices, or whether just compensation is to be measured by the

market value of such requistioned goods at the place of its ultimate destination. On a state of facts substantially on all fours with those in the case at bar, the English Courts reached a result contrary to that of the Court of Claims. (The decisions are referred to in the annexed brief.) On analogous facts, the English High Court of Justice and various international tribunals have found that the proper damages awardable constitute the value of the goods at the point of ultimate destination, not the value at the place of seizure, and certainly not the fiat price fixed by the Executive which made the seizure.

The decision of the Court of Claims, if unreversed, may have its impact on our foreign trade, particularly our shipping, for foreign nationals may hesitate to ship goods via our ports if to do so would subject the goods and their owners to our laws even though such goods were never intended to have a business situs within our territorial limits but merely a temporary or transitory situs, our ports being used as a transfer point for goods awaiting reshipment.

The issue presented is one of first impression and has not been dealt with by this Court in any of the cases decided by it dealing with just compensation resulting from the requisitioning by the United States of property in wartime, particularly with respect to the property of nonresident foreign nationals occupying the status of the petitioner herein.

Conclusion

WHEREFORE, for the reasons stated above and discussed more fully in the annexed brief, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this honorable Court directed to the Court of Claims of the United States to the end that the above cause may be certified to and reviewed and determined by this Court and the judgment of the Court of Claims in the above

entitled cause may be reviewed by this Court, and petitioner prays for such other and further relief as this Court may deem just and proper.

HARRY T. ZUCKER,
Attorney for Petitioner.

Dated: New York, N. Y., September 1st, 1950.

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Petitioner,

against

THE UNITED STATES,

Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the Court of Claims was entered on June 5, 1950, and is reported in 90 Fed. Sup. 551, but has not yet been officially reported. A true copy is in the record (p. 20).

Jurisdiction

A statement of the constitutional, statutory and other grounds upon which the jurisdiction of this Court is invoked is contained in the petition under the heading "Jurisdic-

tional Statement'' and, to avoid duplication, is not repeated here.

Statement of Case

A statement of the case is set forth in the petition under the heading ''Summary Statement of the Case'' and, to avoid duplication, is not repeated here.

Specification of Errors

A statement of the assigned errors which are intended to be urged and the questions presented thereby is contained in the petition under the heading ''Questions Presented and Specification of Errors'' and, to avoid duplication, is not repeated here.

ARGUMENT

The Petitioner Is Entitled to Fair and Just Compensation Measured by the Market Value of the Requisitioned Tin at Its Ultimate Place of Destination, To Wit: Buenos Aires, Argentina.

The facts alleged in petitioner's petition with respect to the acquisition and shipment of the tin and leading up to its requisition by the United States are found in the Special Findings of Fact of the Court of Claims. These Findings, on the authority of *Neumaticos Goodyear, S. A.* v. *United States,* 109 Ct. Cls. 535, 73 Fed. Supp. 969, Cert. Den. 334 U. S. 838 (Finding 12, R. 8) declared that petitioner's proof supporting its demand for fair and just compensation measured by market value in Buenos Aires, Argentina, is immaterial. Having reached this conclusion, the inference to be drawn is that the Court of Claims concluded (although there is no specific finding to that effect) that when the tin was requisitioned by respondent it had a permanent situs within the territorial limits of the United States. Such a conclusion is a legal fallacy unsupported by the facts and,

in fact, contradicted by them; it finds no support in law, but on the contrary, is in conflict with well settled principles of law hereinafter referred to.

It is obvious that petitioner's tin became part of the commerce of the United States not by the desire, consent and acquiescence of the petitioner, but by *force majeure* exercised by the respondent for its own interest and to its own benefit. Petitioner was powerless to resist or to prevent respondent from taking possession of the tin, but respondent could not by such act give the tin a permanent situs here. In fact, the tin had merely a temporary and in-transit status in this country and its permanent situs was where petitioner was domiciled. Respondent could not constrain the petitioner, a nonresident alien neutral having a foreign domicile, to import the tin into the United States when it was its unequivocally expressed purpose and intention, at no time altered but at all times asserted, to ship the tin to Buenos Aires, Argentina. Respondent could not by the exercise of its might give extra-territorial effect to its laws and require petitioner to subject itself to our laws, nor by seizure of the tin to bring it or petitioner within our jurisdiction and the legal embrace of our laws. If this Court were to subscribe to the positive facet of this proposition, it is respectfully suggested that it would have serious implications for our foreign trade. Foreign sellers and buyers might well hesitate to send goods on our ships via any of our ports if there existed always the latent threat that they and their goods would be subjected to our laws whether or not the shippers intended to be so subjected.

It is respectfully urged that the tin having been placed in storage by General Order and having been requisitioned by respondent while in storage, there is presented a situation factually akin to that in *Commercial Estates Co. of Egypt* v. *Ball* (1920), 36 L. T. R. 526, aff'd 1 K. B. (1925) 271 (same case, 23 Lloyd's List Law Reports 218), wherein it

was held that the plaintiff, a nonresident neutral, was entitled to fair compensation for its lumber (which was seized by the British Navy and requisitioned in England), based on the market value at the place of its ultimate destination, Alexandria, Egypt, and not on the basis of fiat prices prevailing in England. The English Courts held that their wartime regulations did not apply to a neutral whose goods had gotten into the country without its consent, but by seizure by one of its war ships. (The pertinent statute is set forth in *Newcastle Breweries* v. *King,* 36 L. T. R. 276.) The general principles of law stated by our courts hereinafter referred to are in accord with the decision in the *Commercial Estates Co. of Egypt* v. *Ball* case, *supra.*

A like question was considered by a Board of Commissioners appointed under the terms of Article VII of the Jay Treaty of 1794 between the United States and Great Britain. The facts of the case involved are set forth in "Damages in International Law" by Marjorie M. Whiteman, LL. B., J. S. D., Assistant to the Legal Adviser of the Department of State, Vol. II, Page 1214 (U. S. Govt. Printing Office, Washington: 1937).

The *Neptune,* an American-owned vessel with an American-owned cargo, was captured on the high seas while en route from the United States to Bordeaux, France, by a British war vessel. The *Neptune* was taken into Portsmouth, a British port, where she was libeled. The High Court of Admiralty ordered the restoration of the vessel, together with freight, demurrage, and expenses, and allowed the owners of the cargo, which consisted of provisions (principally rice), the invoice price plus a mercantile profit of ten percent. This was less than the value of the cargo either at London or at Bordeaux.

A claim was presented to the Board of Commissioners appointed under the terms of Article VII of the Jay Treaty of 1794 between the United States and Great Britain, *for*

the difference between the amount of money paid the owners for the cargo and the amount that would have been received for it at Bordeaux if it had not been seized. The Board of Commissioners allowed the value of the cargo at the port of immediate destination (Bordeaux) at the date of the probable arrival of the vessel, less expenses of transportation and sale, and less the amount already received.

Referring to the rule of damages applied by the Board of Commissioners, one of the Commissioners stated in part as follows (Whiteman, p. 1216):

> "By comparing the rule adopted by the board with the doctrine of Grotius, Pufendorf and Vattel, we shall find that it is conformable to justice, equity, and the law of nations as understood by those celebrated writers; and it is presumed that this is the rule prescribed to belligerents, and with which alone neutrals are under any moral obligation to be content. If there is any principle that authorizes a belligerent to seize on the property of a neutral, on condition of paying him the original cost, and all expenses actually incurred, with interest, and which deems such to be a just and adequate compensation, it must arise from the voluntary or conventional law of nations. The law of nations, as derived from the general principles of justice and equity, states a different doctrine. If the former exists among any European nations, it is unknown to me. If there be such, it can have effect only on those who are parties to it, by an implied or express consent. It can have no influence on this board in defining their duty, for our two nations are not parties to such rule. The one they have adopted is very different. They have not stated that it shall be the first cost, with interest and expenses, with a reasonable mercantile profit thereon, such as is usually made in time of peace, but have expressly contracted that it shall be such as shall measure out to the party full and *complete compensation for the loss and damage sustained by reason of the capture.*"

Since the United States has asserted on behalf of one of its citizens whose property was confiscated that such citizen was entitled to the market value thereof at the place of its original destination, then our courts should not apply to a citizen of a friendly nation a less equitable rule inconsistent with well-settled principles of international law.

In "Damages in International Law", Whiteman, Vol. II, pp. 1242, 1243, in connection with the settlement of the French indemnity claims of 1831, it is pointed out that the market value of the seized goods at the place of destination was fixed as the measure of compensation.

In the *Neumaticos* case, supra, the Court of Claims considered a state of facts parallel with those of the case at bar. It does not appear from the record in that case whether the plaintiff or the defendant entered the rubber through Customs. The plaintiff in that case did not urge that the commodity was not imported into the United States by it and had no permanent situs in this country. It apears to have been assumed by the plaintiff and the defendant in the *Neumaticos* case that the rubber had a permanent situs in the United States. Petitioner's claim in the case at bar, that its tin cannot be affected by the laws of the United States nor the market value here, should not be judged by the rule of law promulgated in the *Neumaticos* case because of the plaintiff's omission there to present an available meritorious legal argument and the gratuitous assumption by both parties to the case of a domestic situs for the rubber. No such conclusion is warranted in the instant case.

Our courts do not discriminate against nor deny fair and just compensation to friendly aliens. *Russian Fleet* v. *U. S.*, 282 U. S. 481.

Petitioner Did Not Import Its Tin Into the United States by Shipping It Via New York for Trans-Shipment to Buenos Aires.

The capitalized contention, predicated on the admitted and unchallenged facts herein, is supported by the following authorities:

In *The Appollon,* 9 Wheaton 362, this Court states (p. 370):

> The laws of no nation can justly extend beyond its own territories except so far as regards its own citizens * * *.
>
> "And, however general and comprehensive the phrases used in our municipal laws may be, they must always be restricted in construction to places and persons upon whom the legislature have authority and jurisdiction."

See *New York Life Ins. Co.* v. *Head,* 234 U. S. 149, 162.

In the case of *The Brig Concord,* 13 U. S. (9 Cranch) 387, goods which were owned by a neutral were taken off a British ship by an American Privateer. On these facts this Court said (p. 388):

> "Where goods are brought by superior force, or by inevitable necessity, into the United States, they are not deemed to be so imported, in the sense of the law, as necessarily to attach the right to duties."

(During the trial of the *Concord* case the attorneys for the claimant consented to the sale of the goods, and because of that fact import duties were imposed.)

Goods are "imported" when:

> "* * * the subject of duty arrives within some port of entry *with the intention that it shall be unladen there and become a part of the commerce of the country; and that when it so arrives an importation has taken place".* (Citing cases) (Italics ours)
>
> *Mata* v. *U. S.,* 19 F. (2) 484, 486.

In *U. S.* v. *Eighty-Five Head of Cattle,* 205 Fed. 679, the Court states (p. 681):

> "The property upon which duties are leviable, and which is forfeitable for failure to enter at the custom house, is property 'imported' into the United States. *To be 'imported' it must be of foreign situs, and brought hither by the owner, or with his consent, with intent to be here held, used, consumed, or enjoyed, or to be here incorporated in the general mass of property.* If brought hither by accident, great, if not inevitable, necessity, *superior force,* or by a trespasser, and timely removed hence, it is not 'imported', nor dutiable, nor subject to forfeiture against the owner". (Citing cases) (Italics ours)

See also, *McLean* v. *Hager,* 31 F. 602; 15 Amer. Juris. (Customs Duties) p. 337, Sec. 60; *U. S.* v. *Edwin S. Hartwell Lumber Co.,* 142 F. 432, cert. den. 201 U. S. 644; *U. S.* v. *Forrester,* Fed. Cases 15132 (end of opinion).

In *Grogan* v. *Walker & Sons,* 259 U. S. 80, Mr. Justice McKenna (dissenting opinion) said (p. 92):

> "Importation and exportation are constituted of something more than ingress of the intoxicants, under bond, at one border of the country, and egress, under bond, at another border, the purpose being for passage only through the country, and having as impalpable effect upon it as if the passage were by airship. Still less, if I may suppose the impossible, is the transshipment of liquors in New York Harbor from one British ship to another, under the supervision of revenue officers, the importation or exportation of the liquors into or from the United States".

See *The Conqueror,* 166 U. S. 110, 115; *Harrison* v. *Vose,* 50 U. S. (9 How.) 372, p. 381.

The principle to be culled from those cases is that to constitute an "import" goods must be delivered from a foreign source to the United States for the purpose of being un-

loaded there and entered for delivery to a resident consignee. Temporary delivery of goods to our shores for transshipment to foreign ports or passage through our territorial limits for delivery outside thereof, does not constitute an import. Under the doctrines above enunciated, petitioner's tin was not imported into the United States.

The Tin Was Not Entered by Petitioner Through the United States Customs. It Therefore Did Not Become Part of the Commerce of the United States Nor Could It Be Subjected to Its Laws.

The tin, in the case at bar, was placed in storage without the request of petitioner, but under authority of a General Order issued by the Government by reason of delay in removing the same from the docks. However, even if the goods had been placed in storage voluntarily by the petitioner, they could not be deemed entered in law so as to charge them with being part of the commerce of the United States.

In the case of *Stone & Downer* v. *U. S.*, 19 C. C. P. A. 259, the Court states (p. 264):

> "No principle is better settled in this court than the one that goods in bonded warehouses are not to be considered as imported until a permit of delivery has been issued and they enter into the commerce of the country". (Citing cases)

In the case of *United States* v. *Twenty-Five Packages of Panama Hats*, 195 Fed. 438, the Government sought to have certain goods forfeited because of the consignor's fraudulent valuation thereof. The goods had not been entered, but were subject to General Order. With respect to these facts, the Court states (p. 441):

> "The condition precedent to a forfeiture, viz., the entry or the attempt to enter, did not exist. *The mer-*

> *chandise has never been introduced 'into the commerce of the United States.' It is not enough that it was brought within the jurisdiction of the United States.* No presumption of an intent to enter can be predicated of that fact. It may well be that the owner of such merchandise, after holding it in 'general order' until he can ascertain where the best market can be found, intends to ship it to a foreign country." (Italics ours)

The Circuit Court of Appeals was reversed by this Court (231 U. S. 358) but this Court did not disapprove the general principles of law stated by the Circuit Court of Appeals. (See *United States* v. *169 Bales Containing Wool,* 56 F. (2) 736). It would appear, therefore, that the decision of this Court has limited application, but that the decision of the Circuit Court of Appeals, except in its application to the particular penal law involved, has general application.

Petitioner did not seek to enter goods into the United States. In fact, it never desired or intended to enter the goods (Plaintiff's Exhibit 5). The general principles of law stated by the Circuit Court of Appeals in the case of *Twenty-Five Packages of Panama Hats* have peculiar application to the facts in the case at bar.

See *American Cigar Company* v. *U. S.,* 146 F. 484, 488; *Puerto Rico Brokerage Co., Inc., et al.* v. *U. S.,* 76 F. (2) 605, 616; *Marriott* v. *Brune,* 9 How. 619, 632.

The Situs of the Tin Is in Law Deemed that of the Domicile of the Petitioner. Therefore the Market Value in Buenos Aires at or About the Time of Its Requisition Measures Its Fair and Just Compensatory Value.

Under the well settled doctrine of *mobilia sequuntur personam,* personal property takes on the domiciliary situs of the owner thereof.

There is an exception to that rule where the personal property has a business situs in a state other than that of the owner's domicile. (See *Pullman's Palace Car Co.* v.

Pennsylvania, 141 U. S. 18; *Hutchinson* v. *Ross,* 262 N. Y. 381; *Shannon* v. *Irving Trust Company,* 275 N. Y. 95; *Matter of Brown,* 274 N. Y. 10.)

The question of the situs of personal property persistently arises in connection with the right of any of our States to tax such property of citizens of other States when found within the former's territorial limits. The issue of the right to tax revolves around the basic fact as to whether the personal property has a permanent or temporary presence in the State. A tax issue is presented here, for if the tin were deemed imported by petitioner it would be subject to customs duties. In the case at bar a representative of the United States Customs Service testified that petitioner did not enter the goods and in such circumstances it was not obliged to pay customs duties (R. 35). There was no importation.

In *Northwest Airlines* v. *Minnesota,* 322 U. S. 292, this Court considers when personal property assumes a permanent or temporary situs and states (p. 304):

> "Does the fact of landing within a state, even regularly and on schedule, confer jurisdiction to tax? Undoubtedly, a plane, like any other article of personal property, could land or remain within a state in such a way as to become a part of the property within the state. But when a plane lands to receive and discharge passengers, to undergo servicing or repairs, *or to await a convenient departing schedule, it does not in my opinion lose its character as a plane in-transit.* Long ago this court held that the landing of a ship within the ports of a state for similar purposes did not confer jurisdiction to tax." (Citing cases) (Italics ours)

In *Hays* v. *The Pacific Mail Steamship Company,* 17 How. 596, this court states (p. 599):

> "We are satisfied that the State of California had no jurisdiction over these vessels for the purpose of

> taxation, they were not properly abiding within its limits, *so as to become incorporated with the other personal property of the State;* they were there but temporarily, engaged in lawful trade and commerce, with their situs at the home port, where the vessels belonged, and where the owners were liable to be taxed for the capital invested, and where the taxes had been paid."

(See *Ayer & Lord Tie Co.* v. *Kentucky,* 202 U. S. 409, 421; *Ott* v. *DeBardeleben Coal Corp.,* 166 F. (2) 509, 514.)

In the case of *Murchie* v. *Delaney,* 82 F. S. 176, an action was brought by the executor of an estate of a decedent, who had been a Canadian citizen, against the United States Collector of Internal Revenue to recover an estate tax alleged to have been illegally collected by the defendant. Decedent sojourned temporarily in Florida. She had with her certain jewels and personal effects which were sent to Canada after her death. The propriety of the tax levied depended upon the situs of the jewels and personal effects. On the issue of situs, the Court states (p. 178):

> "Situs, as based on actual presence of the property, requires a presence which is at least more permanent than that of location at a mere stopping place on a journey."

In *City Bank Farmers' Trust Co.* v. *Schnader,* 8 F. S. 815, affirmed by this Court in 293 U. S. 112, 55 S. Ct. 29, the lower Court defines "situs" as follows (p. 817):

> " 'Actual situs means a little more than simply the place where property is. It excludes the idea of mobile personal property which happens to be in the course of transit in or through the taxing state at the moment when the occasion for taxation arises. It also excludes the idea of property which for some definite purpose of its owner has come to rest within the boundaries of the taxing state for a brief and limited time.' "

In *American Barge Line Co.* v. *Cave,* 68 F. S. 30, the Court states (p. 43):

> "Since, as has been repeatedly held by the United States Supreme Court, *the State of its origin remains the permanent situs of a corporation's movables,* no matter whether they successively move across the State's boundaries for varying periods of time, provided they ever return to the State and never become permanently joined to and intermingled with movables having a tax situs in another state, it is clear that none of Union's tugboats and barges did ever acquire a taxation situs in Louisiana." (Citing cases) (Italics ours)

Needless to say, in the instant case for the tin to be deemed to have a permanent situs here, it must first have been imported by plaintiff.

The doctrine of *mobilia sequuntur personam* is one of general application. It has been applied in connection with the enforcement of penal laws and in civil suits by creditors who sought satisfaction of debts by the attachment of a debtor's property. (See *United States* v. *Powers-Weightman-Rosengarten Co.,* 211 F. 169, p. 170.)

In *Seligmann* v. *Mills,* 25 F. (2) 807, in connection with the plaintiff's right to attach certain notes possessed by the defendant, temporarily brought into the State to establish the maker's default in payment, the Court states (p. 812):

> "The authorities seem to require, in order to reach the property by substituted service or make it taxable, that the presence of the res be with and not against the will of the owner, for a substantial business or protective purpose, not for a purpose disconnected with the substantial business of the owner, or the safety of the res, or as a resting place of the res for a substantial length of time, not for a momentary and fleeting period."

Petitioner Is Entitled to Fair Compensation Measured by the Market Value at Its Intended Final Place of Destination.

In *U. S.* v. *Causby,* 328 U. S. 256, this Court states (p. 261):

> "It is the owner's loss, not the taker's gain, which is the measure of the value of the property taken."

The transshipment of the tin to Buenos Aires having been prevented by the respondent's seizure thereof, the petitioner, a friendly alien, under the doctrine of *lucrum cessans* is entitled to be made whole for the losses it sustained by being deprived of the opportunity to sell such tin for the market price prevailing in Buenos Aires at or about the time of such seizure. (*Norwegian Claims Case, Norway* v. *U. S.*, Award of June 30, 1921, Permanent Court of Arbitration, Proceedings of Tribunal of Arbitration, The Hague, 1922, 111, 152, 153-4; Scott-Hague Court Reports 2d Series 1932-39, 74, 76.)

In *George B. Newton Coal Co.* v. *Davis,* 281 Pa. 74, 126 Atl. 192, affd. 267 U. S. 299, this Court states (p. 301):

> "The owner of property taken under the Lever Act *is 'entitled to the full money equivalent of the property taken, and thereby to be put in as good position pecuniarily as it would have occupied if its property had not been taken.* Seaboard Air Line Ry. Co. v. U. S., 261 U. S. 299, and cases cited. The ascertainment of compensation is a judicial function.' U. S. v. New River Collieries, 262 U. S. 343, 344, 43 Sup. Ct. 565.
>
> "To declare what the compensation for plaintiff's coal should be, and to prescribe rules for taking it, regardless of the owner's loss, would be to take this property out of the protection of the Fifth Amendment.
>
> *"The government as a war measure, under the exercise of governmental powers, may fix prices, either directly or by government regulations necesarily reduc-*

ing the prices; but this does not authorize it to acquire the property in invitum at such reduced prices." National City Bank v. *U. S., supra.*

* * * * * * *

"Conversion must be followed by just compensation." (Italics ours)

Petitioner can "be put in as good position pecuniarily as it would have occupied if its property had not been taken" by being paid the market value in Buenos Aires.

Attention is called to the fact that in the preceding case this Court characterizes the seizure, which is akin to the seizure herein, as a "conversion." The same characterization of a like seizure was made by the Court in *Dexter & Carpenter, Inc.* v. *Davis,* 281 F. 385, 388. Such characterization by the Court of the act of requisition assumes significant meaning with respect to the issues herein when considered in the light of the principles of law stated in the following case and the cases therein cited.

In *Wallingford* v. *Kaiser,* 191 N. Y. 392, the Court states (p. 393):

> "The action was for conversion of a number of horses which were seized by the defendant assuming to act under a warrant of attachment issued to him as Sheriff of Erie County, the animals having been taken from a railroad train at East Buffalo while in course of transportation from Chicago, Illinois, to Liverpool, England."

Summarizing the principles of law applied to said facts, the Court states (p. 397):

> "As may be inferred from what has already been said, I think there is and ought to be an exception to the general rule in trover that the value of the property at the place of conversion is the owner's measure of damages, *in the case of goods converted by a stranger*

at an intermediate point while in the course of transportation; and that where the property was wrongfully taken is on the way to a profitable market where it would certainly have arrived, the owner is entitled to recover the value of the goods at the place of destination, less the cost of carriage and the cost of affecting a sale in that market. The purpose of the law is to afford just and reasonable compensation to the injured party for the natural and proximate consequences of the wrongful act; and this can hardly otherwise be accomplished in such case as that which we have presented for our consideration here * * *; and the defendant's lack of information as to the particular destination of the animals is not available to him in mitigation. (See *Lathers* v. *Wyman,* 76, Wisc. 616.)" (Italics ours)

In the case at bar the respondent was aware of the tin's ultimate destination (Defendant's Exhibit 13A).

The Language of General Preference Order M-43 and General Preference Order M-43 as Amended Does Not Bind Petitioner's Tin But by Its Very Language Excludes It.

The respondent has placed great reliance on General Preference Order M-43 and General Preference Order M-43 as amended (Federal Register-Dec. 18, 1941, p. 6519; Jan. 1, 1942, p. 33; Jan. 6, 1942, p. 4290; June 18, 1942, p. 4536) for support of its contention that petitioner is entitled only to the market value of its tin in New York. The substance of its contention is that since by such General Preference Orders Metals Reserve Company is designated as the sole buyer and seller of tin, and as a result of that happy situation was in a position to fix the sale and purchase price of tin, petitioner cannot complain if it can obtain no more than the price fixed, for its injury is a mere consequence of such regulations duly promulgated under authorized war legislation.

In relation to the factual situation in the case at bar, respondent puts the cart before the horse. It has not endeavored to establish that petitioner has imported its tin into the United States so as to come within the provisions of said General Preference Orders. It assumes importation to be a fact in complete disregard of the evidence and the law referred to above.

It is evident from the definitions, the regulations and directives present in General Preference Order M-43 that it applied only to goods that were imported.

"Imported" is defined to mean material that has arrived at "the port of destination". (See Sec. 1001.1 (a) 1 and 2).

The statutory definition coincides with prior judicial opinion. See *U. S.* v. *Edwin S. Hartwell Lumber Co.*, 142 F. 432, 436, cert. den. 201 U. S. 644.

Petitioner has demonstrated that in fact and in law there was no importation of its tin into the United States (supra, pp. ~~6-11~~ 19-21; Petition pp. ~~4, 7, 8~~ 3, 6). There can be no question that the tin did not arrive at its port of destination, for the unquestioned through bill of lading under which it was shipped from Singapore specifically and unequivocally states that its port of destination was Buenos Aires, Argentina.

Since, as we have shown, petitioner's tin was not subject to the authority of our laws, because it was not imported, the denial to petitioner of an export license under the Presidential regulation requiring such authorization for goods in-transit (Special Finding 3, R. 5) did not oblige petitioner to accept compensation less than the market value at its place of destination. Petitioner was, as a result thereof, helpless to transship its tin, but it was not thereby deprived of its equitable right to receive just compensation which, in the case at bar, is the market value in Buenos Aires, Argentina.

In *Foreign Trade Management Co. Inc.*, v. *U. S.*, 74 F. S. 550, 551, 110 Ct. Cls. 23, cert. den. 334 U. S. 831, it was held that the rejection of an export license did not preclude the plaintiff from receiving the export price. The same principle should apply to petitioner's right to just compensation measured by the market price in Buenos Aires, Argentina, even though an export license was denied. *Swiss Confederation* v. *U. S.*, 70 F.S. 235, p. 238, 109 Ct. Cls. 868, cert. den. 332 U. S. 815.

Petitioner need not labor the argument that the penal provisions and the regulatory and directive provisions of General Preference Order M-43, restricting the use of the tin, could not bind the petitioner, an Argentinian corporation having no office in the United States.

(See *The Appollon,* 9 Wheaton 362, 370; *Hilton* v. *Guyot,* 159 U. S. 113, 163.)

In *Bernhard, et al.* v. *Metcalf Construction Co., et al.,* 64 F. S. 953, the Court states (p. 954):

> "Citations of authorities are not necesary to support the proposition *that the definitions contained in the Act are controlling and must be accepted,* and these definitions definitely limit the application of the Act to the territories and possessions. *American Banana Co.* v. *United Fruit Co.,* 213 U. S. 347."

No State can by its laws directly affect, bind or regulate property beyond its own territory, or control persons who do not reside within it whether native-born subjects or not; and a system which would recognize in our State the power of regulating persons or things beyond its territory would exclude the equality of rights among nations and the exclusive sovereignty which belongs to each of them. (30 American Jurisprudence, p. 193, citing *U. S.* v. *Flores,* 289 U. S. 137; *Baglin* v. *Cusenier Co.,* 221 U. S. 580; *U. S.* v. *Wong Kim Ark,* 169 U. S. 649.)

For the purposes of the requisition in question, both petitioner and its property were "beyond" the territory of the United States, and neither could be affected by the provisions concerning price control.

Under Settled Principles of International Law, the Price Ceilings Are Inapplicable

The decisions of the international tribunals above mentioned (The Neptune, "Damages in International Law" by Whiteman, Volume II, page 1214 (U. S. Government Printing Office, Washington: 1937); The French Indemnity Claims, "Damages in International Law" by Whiteman, Volume II, pp. 1242-3) are entitled to earnest consideration in the resolution of the question at bar.

In 30 American Jurisprudence, p. 178, it is said:

> "Unless there is some treaty or statute to the contrary, the law of nations is to be treated as part of the law of the land." (*The Nereide,* 9 Cranch, 388.)

Our Courts take judicial notice of the law of nations. (*The Habana,* 175 U. S. 677; *The Scotia,* 14 Wall. 170.)

The action of Congress and of the Executive in authorizing and fixing price controls should not be construed to violate the law of nations if any other possible construction remains. (*Murray* v. *The Charming Betsy,* 2 Cranch 64.)

U. S. v. Commodities Trading Corp., 339 U. S. 129, Is Not Controlling

The majority and minority opinions of this Court in the *Commodities* case consider the effect of a requisition from a domestic corporation of a quantity of pepper. The majority opinion in the case proceeds upon the theory that sacrifices are necessary in war time of a people engaged in war. It is respectfully submitted that it is not unfair to suggest that

the rationale of the majority opinion was in essence predicated upon the hardships inherent in citizenship in a country at war, and both the majority and minority opinions considered the economic factors inherent in such situation.

Petitioner here is a nonresident alien neutral, not subject to our jurisdiction nor its goods to our laws. Clearly, it had not the responsibility nor was it required to shoulder the burdens of citizens of this nation, and the application to it of fiat prices, to its serious damage, violates all concepts of fair dealing in international relations.

Petitioner's cost of the requisitioned tin was 56.23¢ per lb. (R. 6) plus freight charges to New York (R. 66A). Certainly fair dealing in international relations should require as a minimum full restitution to a friendly neutral as distinguished from the penalties of "unjust compensation". The instant case, it is submitted, falls within the language of the majority opinion in the *Commodities Trading* case where the Court said, page 123:

> "This Court has never attempted to prescribe a rigid rule for determining what is 'just compensation' in all circumstances and in all cases. Fair market value has normally been accepted as a just standard but when market value has been too difficult to find, or when its application would result in manifest injustice to owner or public, courts have fashioned and applied other standards."

In the dissenting opinion of Mr. Justice Frankfurter in the *Commodities* case, it was said:

> "A system of price controls which is 'generally fair and equitable' may give rise to individual instances of hardship in the requisitioning of property no matter how conscientiously and competently administered. See *Bowles* v. *Willingham*, 321 U.S. 503, 516-518, 64 S. Ct. 641. The hardship may reach such magnitude in

an individual instance as to make a taking by the public on a ceiling price unjust compensation."

The application of the so-called market value, i.e., "controlled prices", "fiat prices", "ceiling prices", would manifestly result in injustice to this petitioner, a neutral alien, non-resident, whose property was expropriated by the defendant.

Conclusion

For the foregoing reasons, petitioner prays that this Court grant certiorari to correct the errors of the Court below.

Respectfully submitted,

HARRY T. ZUCKER,
Attorney for Petitioner.

APPENDIX

Exportation Restrictions on Certain Articles
Act July 2, 1940, C. 508, 54 Stat. 714
(50 U.S.C.A., War, Appendix)

Sec. 701. Prohibition or curtailment of exportation of articles, data, etc.; penalties.

(a) The President is hereby authorized to prohibit or curtail the exportation of any articles, technical data, materials, or supplies, except under such rules and regulations as he shall prescribe.

(b) Unless the President shall otherwise direct, the functions and duties of the President under this section shall be performed by the Foreign Economic Administration.

(c) In case of the violation of any provision of any proclamation, rule or regulation issued hereunder, such violator or violators, upon conviction, shall be punished by a fine of not more than $10,000, or by imprisonment for not more than two years, or by both such fine and imprisonment.

(d) The authority granted by this section shall terminate on June 30, 1945 or upon any prior date which the Congress by concurrent resolution, or the President, may designate; except that as to offenses committed, or rights or liabilities incurred prior to such date, the provisions of this section and such rules, regulations, and proclamations shall be treated as remaining in effect for the purpose of sustaining any suit, action, or prosecution with respect to such right, liability, or offense. July 2, 1940, 10:55 a.m., E.S.T., c. 508, Sec. 6, 54 Stat. 714, as amended June 30, 1942, c. 461, 56 Stat. 463; July 1, 1944, c. 360, 58 Stat. 671.

Requisition of Military Equipment, Materials and Supplies

Act Oct. 10, 1940, C. 836, 54 Stat. 1090

Sec. 711. Requisition for United States of export military materials.

Whenever the President determines that it is necessary in the interest of national defense or prosecution of war to requisition and take over for the use or operation by the United States or in its interest any military or naval equipment or munitions, or component parts thereof, or machinery, tools, or materials, or supplies necessary for the manufacture, servicing, or operation thereof, ordered, manufactured, procured, or possessed for export purposes, the exportation of which has been prohibited or curtailed in accordance with the provisions of section 6 of the Act approved July 2, 1940 (Public, Numbered 703, Seventy-sixth Congress; 54 Stat. 714 (section 701 of this Appendix)), as heretofore or hereafter amended, or any other law, he is hereby authorized and empowered to requisition and take over for the use or operation by the United States, or in its interest, any of the foregoing articles or materials, and to sell or otherwise dispose of any such articles or materials, or any portion thereof, to a person or a corporation of the United States whenever he shall determine such action to be in the public interest. Any moneys received by the United States as the proceeds of any such sale or other disposition of any such articles or materials or any portion thereof shall be deposited to the credit of that appropriation out of which was paid the cost to the Government of the property thus sold or disposed of, and the same shall immediately become available for the purposes named in the original appropriation: *Provided, however,* That nothing in this section shall modify or repeal section 14 of Public Law Numbered 671, 76th Congress, approved June 28, 1940 (sections 1262a of Title 10, and 546e of Title 34). Oct. 10, 1940, c. 836, Sec. 1, 54 Stat. 1090, as amended July 2, 1942, c. 471, Sec. 1, 56 Stat. 467.

Act Oct. 10, 1940, C. 836, 54 Stat. 1091

Sec. 712. Compensation for appropriated materials.

Whenever the President shall requisition and take over any article or material pursuant to the provisions of this Act, the owner thereof shall be paid as compensation therefor such sum as the President shall determine to be fair and just. If any such owner is unwilling to accept, as full and complete compensation for such article or material, the sum so determined by the President, such owner shall be paid 50 per centum of the sum so determined by the President and shall be entitled to sue the United States for such additional sum as, when added to the sum already received by such owner, such owner may consider fair and just compensation for such article or material, in the manner provided by section 41 (20) and 250, Title 28, of the Code of Laws of the United States of America: *Provided,* That recovery shall be confined to the fair market value of such article or material, without any allowance for prospective profits, punitive or other damages. Oct. 10, 1940, c. 836, Sec. 2, 54 Stat. 1091.

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 287

SUDAMETAL SOCIEDAD ANONIMA SUD AMERICANA DE METALES Y MINERALES, ALSO KNOWN AS SUDAMETAL, S. A., PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 15-21) is reported at 90 F. Supp. 551.

JURISDICTION

The judgment of the Court of Claims, after the granting of a motion for a new trial, was entered on June 5, 1950 (R. 20). The petition for a writ of

certiorari was filed on September 2, 1950. Jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether just compensation for the requisition of petitioner's tin stored in a customs warehouse in New York is to be measured by the ceiling price of tin in New York or by the price of tin in Buenos Aires, Argentina, to which petitioner, a citizen of Argentina, intended to ship the tin before it was prevented from doing so by a ban on the export of the tin.

STATUTES AND PROCLAMATION INVOLVED

The pertinent provisions of the requisition statute (Act of October 16, 1941, 55 Stat. 742, as amended (50 U.S.C. App. (1940 ed., Supp. III) 721)) and of the Act of July 2, 1940 (54 Stat. 714) and proclamation issued thereunder (Presidential Proclamation No. 2413, July 2, 1940 (5 F.R. 2467)) forbidding the export of tin, are set forth in the Appendix, *infra,* pp. 11-13.

STATEMENT

On or about November 15, 1941, petitioner corporation, a citizen of Argentina, purchased a quantity of tin in Singapore, at an average price of 56.23 cents a pound, for shipment to Buenos Aires via trans-shipment at New York (R. 6). On account of a marine disaster, the tin did not reach New York until May 4, 1942, where 523 slabs of tin weighing a total of 54,180 pounds were un-

loaded and placed on the dock. At this time, and since July 6, 1940, an export license was required before the tin could be loaded on another vessel and exported to Argentina (R. 5-6; Appendix, *infra*, p. 13). While petitioner was seeking an export license, the tin was placed in a bonded warehouse for storage under customs regulations providing that while the material was so stored the owner could enter it for consumption in the United States, upon paying the appropriate duties, or he could enter it for reexport. However, if the owner took no affirmative action to enter the goods within a year, the tin would be sold and the proceeds applied in payment of duties and storage charges. (R. 7).[1]

Petitioner made two separate applications for an export license to permit the shipment of its tin to Argentina, one on August 18 and the other on August 31, 1942, covering 44,000 out of the 54,180 pounds of its tin in storage. The applications were rejected on September 9, on the ground that the proposed exportation was contrary to the interest of national defense (R. 7, 70A). On or about September 10, 1942, the Navy Department, upon requisition, took possession of the tin at its place of storage, released it from the bonded warehouse and entered it through customs (R. 7). The Navy

[1] The removal of the tin from the dock upon which it had been unloaded and its storage under the above conditions were required by General Order 13292, issued by the United States Customs Service pursuant to Section 490 of the Tariff Act of 1930, as amended, 19 U.S.C. 1490 (R. 6-7).

Department rejected petitioner's claim for compensation based upon the asserted price of tin in Argentina of $1.83 a pound (R. 8), and instead allowed petitioner a preliminary award at the rate of 52¢ a pound, which it found to be the market value of the tin within the ceiling price (R. 9). This was the price at which the Metal Reserves Board would sell tin to any holder of an allocation or priority order therefor (R. 17).

Petitioner brought suit on April 11, 1944, in the Court of Claims for $97,983.44, which it claimed was the fair value of the tin, less import duties, taxes and costs of delivery (R. 1-4), at the nearest free market in Buenos Aires, Argentina, at the time of the requisition and at the time of the probable delivery of the tin in Buenos Aires.

The Court of Claims held that petitioner was prevented from shipping the tin to Argentina by lawful regulations of the United States, banning export, of which it could not complain (R. 16). Its claim was, therefore, only for just compensation for the requisition of tin in New York, and the measure of compensation was the price of tin prevailing at the time and place of the taking. The Court of Claims at first rejected the ceiling price, and instead granted a price of 54.79 cents a pound which the Metal Reserves Board had paid for tin purchased in the Belgian Congo (R. 18). After the decision of this Court in *United States* v. *Commodities Trading Corp.*, 339 U.S. 121, the Court of Claims granted a motion for a new trial, and

limited petitioner to the ceiling price for export tin at the time and place of the taking, or 53¢ a pound (R. 20).

ARGUMENT

The court below was plainly right in measuring just compensation for petitioner's property at the prevailing market prices in existence at the time and place of the taking. *United States* v. *New River Collieries Co.*, 262 U.S. 341. To avoid this well established rule, petitioner argues that, because the tin came into a port of the United States on an "intransit" order and belonged to a friendly alien, the tin was not, for purposes of determining its value, legally in New York, despite its physical location there, and that the claim must be judged by international law, which petitioner asserts measures the value of the property taken in these circumstances by the price at the place of its intended destination. Neither of these contentions has any merit.

By petitioner's voluntary action, the tin was in the United States in a bonded warehouse from which it could be taken by the owner to be sold in the United States or exported or seized by the customs authority after a year if the owner failed to enter it for consumption or exportation. It is idle to assert that, in these circumstances, the tin was any more beyond the sovereign power of the United States to requisition than any other quantity of tin in the United States. The cases cited by petitioner, dealing with the situs of personal

property for various purposes, are irrelevant (Pet. 19-26). Petitioner's argument reduces itself to the absurdity that the property physically in New York and subject to sale there must be valued as if it were for sale in Buenos Aires. Cf. *Burnet* v. *Brooks,* 288 U.S. 378, 391.

Petitioner's next contention, that its claim must be judged by international law also fails in every respect. Assuming for the moment that petitioner's claim is to be judged by rules of international law, petitioner must meet at the outset the principle that alien property in the United States may be requisitioned provided that no greater burden is imposed upon aliens than upon nationals. Borchard, *Diplomatic Protection of Citizens Abroad* (1915), p. 113; II Whiteman, *Damages in International Law,* p. 900; Wormser, *Collection of International War Damage Claims,* p. 147. The court below, in granting petitioner compensation based upon the price of tin in New York at the time of the taking, treated petitioner's claim exactly as if it were the claim of an American citizen (R. 17). Moreover, in the event of requisition, the damages awarded by international tribunals are often measured by the value of the property at the time and place of the taking. Whiteman, *op. cit., supra,* at pp. 902-920. And international law does not appear to set aside government fixed prices; on the contrary, where prices are set by a government for requisitioned property, those prices are frequently adopted by international claim tribunals

as the measure of damages. Whiteman, *op. cit., supra,* at p. 905. The award below therefore appears to meet the tests of just compensation under international law.

But international law has nothing to do with this case. Petitioner is not presenting its claim to an international claims tribunal or through diplomatic negotiations; it is instead suing in the Court of Claims on the reciprocal right, granted to citizens of Argentina, to sue the United States in the Court of Claims on the same grounds as a citizen of the United States, 28 U.S.C. 2502 (R. 5). Its claim must be founded upon the Constitution and laws of the United States (28 U.S.C. 1491), and petitioner's complaint expressly seeks just compensation under the requisition statutes of the United States (R. 1). Indeed, by this suit, petitioner makes the fact of its alienage wholly irrelevant; its case is to be judged as that of an owner of property for just compensation, for a public taking, regardless of the nationality of the owner. *Russian Volunteer Fleet* v. *United States,* 282 U.S. 481, 491.

On this basis, entirely favorable to it as a matter of principle, petitioner has no claim for damages against the United States because of the denial of the export license. *Horowitz* v. *United States,* 267 U.S. 458; *Neumaticos Goodyear S. A.* v. *United States,* 109 C.Cls. 535, certiorari denied, 334 U.S. 838. Its claim for compensation rests upon the requisition of the tin, and is measured by the pre-

vailing prices at the time and place of the requisition where, as here, there is a market price prevailing at the time and place of the taking. *United States* v. *New River Collieries, supra; United States* v. *Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. 396, 404.

The case of *Commercial and Estates Co. of Egypt* v. *Ball*, 36 L.T.R. 526, approved in *Commercial and Estates Co. of Egypt* v. *Board of Trade*, 1 K.B. (1925) 271, and the *Neptune* award, II Whiteman, *op. cit., supra*, p. 1214, upon which petitioner places chief reliance (Pet. 15-16) are not in point, for they involve a taking wholly different from the taking here. In *Commercial and Estates of Egypt Ltd.*, the property, when taken, was cargo on a vessel seized in a neutral port, and brought into a British port against the will of the owners. The holding in the case is that property in a foreign port under British military control may not be requisitioned under the domestic requisitioning statute and compensation for its taking is not limited by the restrictions of the requisitioning statute.[2] One

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[2] Furthermore, the case does not decide the precise measure of damages. In the first decision, the court dismissed the suit against the requisitioning officer on the ground that the petitioner's claim was not under the requisitioning statute, but was a claim for just compensation because of the seizure of property under the right of "angary", a principle of international law. 36 L.T.R. at 527. Petitioner accordingly brought a second suit which, however, was dismissed by the war compensation claims court; the Kings Bench reinstated the suit, upholding the correctness of the first decision but left the question of damages to the lower court. 1 K.B. (1925) at 284, 297. As to damages, the decision only holds that the claimant

English judge suggested that the requisitioning statute would apply to property brought even temporarily into the country by neutrals voluntarily seeking its protection. Atkins, L. J., 1 K.B. (1925) at 293. In the case at bar, the property was within the United States by petitioner's voluntary action. Moreover, petitioner does not contend that its property was exempt from requisition; on the contrary, as noted above, its claim is expressly founded on the provision for just compensation in the requisition statute. (See Appendix, *infra*, pp. 11-12).

In the *Neptune* award, the property was taken while cargo on a vessel captured on the high seas. Obviously, there was no market price at the time and place of the taking. Cf. *United States* v. *Toronto, Hamilton & Buffalo Navigation Co., supra.*

Petitioner's contention that there was no market price at New York because the maximum price of tin was fixed by governmental regulations is fully answered by *United States* v. *Commodities Trading Corp., supra.* At most, petitioner was entitled to the export price of tin, *United States* v. *New*

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would not be limited to the fixed prices for requisitioned goods, which by statute were fixed without regard to the market price of the goods at the time and place of the taking. See Regulation 2B of the Defense of the Realm Regulations, 1 K.B. (1925) at 298-299. It was left to the war compensation claims court to make "a just assessment of compensation" taking into account all the circumstances of the taking, including the state of war. *Idem.* at 300.

River Collieries, supra, and the price, which petitioner has been awarded, included an export premium of 1¢ a pound over the domestic price (R. 17).

CONCLUSION

There is no conflict of decisions and the case does not warrant further review. It is respectfully submitted therefore that the petition for a writ of certiorari be denied.

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OCTOBER 1950.

APPENDIX

1. Act of October 16, 1941, 55 Stat. 742, as amended (50 U.S.C. App. (1940 ed., Supp. IV) 721) provided as follows:

> * * * whenever the President, during the national emergency declared by the President on May 27, 1941, but not later than June 30, 1945, determines that (1) the use of any military or naval equipment, supplies, or munitions, or component parts thereof, or machinery, tools, or materials necessary for the manufacture, servicing, or operation of such equipment, supplies, or munitions is needed for the defense of the United States; (2) such need is immediate and impending and such as will not admit of delay or resort to any other source of supply; and (3) all other means of obtaining the use of such property for the defense of the United States upon fair and reasonable terms have been exhausted, he is authorized to requisition such property for the defense of the United States upon the payment of fair and just compensation for such property to be determined as hereinafter provided, and to dispose of such property in such manner as he may determine is necessary for the defense of the United States. The President shall determine the amount of the fair and just compensation to be paid for any property requisitioned and taken over pursuant to this Act and the fair value of any property returned under section 2 of this Act, but each such determination shall be made as of the time it is requisitioned or returned, as

the case may be, in accordance with the provision for just compensation in the fifth amendment to the Constitution of the United States. If, upon any such requisition of property, the person entitled to receive the amount so determined by the President as the fair and just compensation for the property is unwilling to accept the same as full and complete compensation for such property he shall be paid 50 per centum of such amount and shall be entitled to sue the United States in the Court of Claims or in any district court of the United States in the manner provided by sections 24 (20) and 145 of the Judicial Code (U.S.C., 1934 ed., title 28, secs. 41 (20) and 250) for an additional amount which, when added to the amount so paid to him, he considers to be fair and just compensation for such property. Such courts shall also have power to determine in an appropriate proceeding any questions that may arise with respect to the amount of the fair value to be paid upon the return of any property under section 2 of this Act, regardless of the amount in controversy in any such proceeding.

2. Section 6 of the Act of July 2, 1940, 54 Stat. 714, reads as follows:

Sec. 6. Whenever the President determines that it is necessary in the interest of national defense to prohibit or curtail the exportation of any military equipment or munitions, or component parts thereof, or machinery, tools, or material, or supplies necessary for the manufacture, servicing, or operation thereof,

he may by proclamation prohibit or curtail such exportation, except under such rules and regulations as he shall prescribe. Any such proclamation shall describe the articles or materials included in the prohibition or curtailment contained therein. In case of the violation of any provision of any proclamation, or of any rule or regulation, issued hereunder, such violator or violators, upon conviction, shall be punished by a fine of not more than $10,000, or by imprisonment for not more than two years, or by both such fine and imprisonment. The authority granted in this section shall terminate June 30, 1942, unless the Congress shall otherwise provide.

3. The relevant provisions of Presidential Proclamation No. 2413, July 2, 1940 (5 F.R. 2467) are as follows:

> * * * I have determined that it is necessary in the interest of the national defense that on and after July 5, 1940, the articles and materials hereinafter listed shall not be exported from the United States except when authorized in each case by a license * * *.
>
> 2. v. Tin.

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Supreme Court of the United States

OCTOBER TERM, 1950

No. 287

SUDAMETAL SOCIEDAD ANONIMA SUD AMERICANA DE METALES Y MINERALES, also known as SUDAMETAL, S. A.,

Petitioner,

v.

THE UNITED STATES,

Respondent.

REPLY BRIEF FOR PETITIONER

HARRY T. ZUCKER,
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Respondent.

REPLY BRIEF FOR PETITIONER

Respondent in its brief skirts the factual issue repeatedly stressed by petitioner that it had never imported its tin into the United States so as to become part of the commerce of the United States. Respondent does not refute this contention, for it can not. Respondent does not question or impeach the cases referred to in petitioner's main brief (pp. 19-21 inclusive), which hold that when there is no import or entry of goods into the United States, such goods are not subject to the force and authority of its laws.

See:

Royal Holland Lloyd v. *United States,* 73 Ct. Cls. 722, page 740.

Respondent predicates its argument on an assumed state of facts which contradict and ignore the record facts and respondent's own admission. The record discloses the following stipulation (R. 39-40):

"5. Immediately after the arrival of the 'SS' Collingswood in New York said tin was placed in a

bonded warehouse by order of and upon the instruction of the Customs Bureau of the Treasury Department of the United States of America. The exportation of said tin from the United States was prohibited under the terms of the Act of July 2, 1940 (54 Stat. 714), as amended June 30, 1942 (56 Stat. 463), unless and until a license for the shipment thereof to plaintiff in Argentina was first obtained. (That by the use of the word 'exportation' the claimant does not concede that (fol. 70) the shipment of the tin from New York to Argentina would be an export.)

"7. On or about the 10th day of September, 1942, the United States, acting through its Navy Department under Navy requisition No. 70, requisitioned and took possession of 523 slabs of Straits Refined tin weighing 54,180 pounds, being the tin aforesaid in storage at Bowne-Morton Stores, Inc. A photostatic copy of the notice of requisition is hereto annexed, by this reference is made a part heref, and is marked Exhibit 3.

"8. That such requisition and taking by the Navy Department was without the consent or acquiescence of the plaintiff."

Although respondent entered the tin for its own benefit and purposes and against the wishes of petitioner, nevertheless the respondent contends that, since the tin continued in the United States under a General Order issued by the United States Customs authorities, (in effect by respondent's *force majeure* since it denied petitioner's repeated requests to permit the tin to be transshipped to Argentina (R. 7, f. 8)) it could be requisitioned by the Navy Department and be paid for on the basis of the fiat prices fixed by the Office of Price Administration, an executive arm of the respondent. Respondent, through Customs, having detained the tin and impeded petitioner's attempts to continue the transshipment of the tin and having repeat-

edly denied petitioner's application for "export" licenses in pursuance of the attempt to transship, subjected the goods to requisition while they were in the bonded warehouse. Petitioner had not "imported" the tin and the only import was that made by respondent through the so-called "consumption entry". The tin arrived in New York aboard the "Collingswood" on May 4, 1942; and it was unloaded between May 4 and June 2, 1942 and on June 2 and 3 of that year the tin was placed in the bonded warehouse (R. 30). Three months later and on September 5, the Secretary of the Navy directed the requisition (R. 57) and on September 10 the requisition was actually made (R. 55).

We submit that judicial notice will be taken of the fact that all vessels under the American flag were subject to the orders of the Navy from a date immediately after the attack on Pearl Harbor, that in legal theory the "Collingswood" and its contents were under the control of the respondent through the Navy Department from the date when the goods were placed on board that ship. That tin was a critical commodity to the prosecution of the war will be judicially noticed. The record portrays cohesiveness of action and complete liaison among the various departments of respondent concentrated upon the single objective of requisitioning petitioner's tin for war purposes. The Navy controlled the tin en route to the United States, the Customs Department ordered the tin into bonded warehouse, the United States Despatch Agent, on orders of the Navy Department, made the consumption entry, respondent thus, itself, importing the tin, the Navy Department thereafter requisitioned it and the Office of Price Administration determined the so-called "fair measure" of petitioner's compensation. All of the foregoing departments acted in consequence of directions of the Executive. The Executive seized and the Executive fixed the price at substantially less than the cost of the goods to petitioner and

upon the footing that petitioner whose goods were lawfully in transit to it in Argentina must suffer the consequences borne by a people at war (cf. *United States* v. *Commodities Trading Corp.*, 339 U. S. 121).

Respondent, by the exercise of dominion over the goods and the forced entry thereof into the commerce of the United States, could not thus make of the petitioner an importer thereof, and thus subject the petitioner's goods to treatment as though the same were within the jurisdiction (Petitioner's brief, pp. 19-22, 28-31).

The "Question Presented" in Respondent's Brief (p. 2), as stated, conveys the misleading impression that petitioner had imported and entered its tin into the United States, that it had voluntarily stored the tin in a warehouse in this country and thereafter sought to export such tin to Buenos Aires, Argentina. The record fact is that the tin was shipped from Singapore on a through bill of lading to Buenos Aires, Argentina, via New York, that petitioner did not import and enter the tin and did not order the tin placed in a warehouse for its account (R. 6, f. 7).

Respondent (Brief, p. 5) on the authority of *United States* v. *New River Collieries Co.*, 262 U. S. 341, urges that petitioner can claim for its requisitioned tin only the market price prevailing at the time and place of the confiscation. Petitioner does not quarrel with that principle of law, but respectfully urges that it has no application to the facts herein. In the *Collieries* case the property confiscated had a business and permanent situs in the United States. Petitioner's tin had no such business and permanent situs (R. 6, f. 5).

Referring to the stated principle of law in the *Collieries* case, respondent states (Brief p. 5):

> "* * * To avoid this well established rule, petitioner argues that, because the tin came into a port of the

> United States on an 'intransit' order and belonged to a friendly alien, the tin was not, for purposes of determining its value, legally in New York, despite its physical location there."

This is an inaccurate statement of the facts. Plaintiff's tin did not come into the United States on an "intransit order". It arrived here under a *through bill of lading* destined for Buenos Aires, Argentina, via New York. It was refused an "intransit order" and it was refused an export license (R. 7, f. 8). Under the maxim *mobilia sequuntur personam* physical presence is not enough to subject petitioner's property to our laws. The property must have a situs here which under the authorities connotes a business or permanent presence.

Respondent states (Brief, p. 5):

> "By petitioner's voluntary action, the tin was in the United States in a bonded warehouse from which it could be taken by the owner to be sold in the United States or exported or seized by the customs authority after a year if the owner failed to enter it for consumption or exportation."

This is again an inaccurate statement of the facts. The provisions of the Tariff Act referred to in respondent's brief have not the slightest application. Petitioner's tin was not in a bonded warehouse by the voluntary action of the petitioner. It was placed in the warehouse under a General Order issued by the United States Customs authorities (R. 6, f. 7). The first alternative, to wit, entry by petitioner for consumption in the United States was clearly never its intention or desire. The second alternative, to wit, entry of the goods for re-export was again clearly not petitioner's intention or desire. Nor is there anything in the record to justify the conclusion that petitioner intended that its goods should remain in storage for

a one-year period, thereafter to be sold and the proceeds of the sale to be applied in payment of United States customs duty and storage charges.

The bill of lading stated clearly that the tin was destined for Argentina for delivery to petitioner who was named as consignee (R. 66A). Petitioner had no office in the United States (R. 5, f. 1). Petitioner did not intend to sell the tin in the United States but had a purchaser therefor in Buenos Aires (R. 53, Plaintiff's Ex. 6). The "export" of the tin was denied despite repeated efforts to obtain a license therefor, the license being denied by another arm of the Executive (R. 7, f. 8).

By the law of nations and by Presidential proclamation, respondent had the power to requisition the tin, but it had a concomitant duty and obligation, under well settled principles of law, to pay for the tin at its market value at its ultimate place of destination.

This Court's decision in *Burnet* v. *Brooks,* 288 U. S. 378, referred to by respondent (Brief, p. 6) does not invalidate petitioner's contention that under the maxim *mobilia sequuntur personam* its tin must be deemed to have a situs in Buenos Aires, Argentina. In the *Burnet* case this Court does not impeach this maxim, but holds that because of the Congressional intent latent in the revenue statute considered therein and because of the fiscal use made of the securities involved, the principle of the maxim was inapplicable. In the *Burnet* case, the securities had, in effect, a "business" situs in this country (See opinion, p. 386).

It clearly appears therein that the presence of the securities in the United States was of a permanent nature. This Court states that the Congressional intention was predicated on the then accepted principles of law with respect to the situs of intangible securities, and that they be taxed

in the light of such principles (see *Delaney* v. *Murchie*, 177 F. 2d 444, 446, affirming *Murchie* v. *Delaney*, 82 F. S. 176, 178).

For the reasons herein and in petitioner's main brief stated, no such "business situs" or "permanent location" in the United States can be imputed to petitioner's tin. Its continued presence was effected not by the voluntary action of petitioner, but by the constraint of the respondent by its refusal to permit trans-shipment of the tin to Buenos Aires, Argentina.

Respondent urges (Brief, p. 6) that petitioner's contention that its claim be judged by principles of international law must fail because the respondent had the right to requisition alien property in the United States provided no greater burden is imposed on aliens than on nationals. In support of that contention, it refers, among other authorities, to *Borchard, "Diplomatic Protection of Citizens Abroad"* (1915), page 113.

Borchard states:

> "The person and property of neutrals are in principle subject to such exceptional measures of jurisdiction and to such exceptional taxation and seizure for the use of the state as the existence of hostilities may render necessary, provided that no greater burden is imposed upon aliens than upon nationals."

In a footnote to that statement, Borchard remarks:

> "This would include the right of angary by which foreign or national vessels may be seized in the ports of the state and compelled to transport soldiers or render other military service. Phillimore, op. cit., III, 50; Hall, op. cit., 737."

Referring to the right of angary, the court in *Commercial & Estates Co. of Egypt* v. *Ball*, 1 K. B. (1925) 271,

states (p. 293):

> "On the other hand there is a well ascertained right of a belligerent Sovereign to take possession of the property of neutrals so found within his territory occupied by his forces for the purposes of warfare. *This is the right of angary.* It appears to me to be well recognized by the conventions of civilized nations, which constitute the body of international law, and *it is equally clear that it is only so recognized on the footing that the Sovereign so exercising this right makes full compensation for the property he so seizes.*" (Italics ours.)

In petitioner's main brief, the Court's attention is directed to the fact that in the *Commercial & Estates Co. of Egypt* case, the Court held that full compensation to an alien neutral for its requisitioned goods was the market value at its place of intended destination. It is submitted there is difference without distinction between the taking on the high seas by the British warship in the *Commercial & Estates Co. of Egypt* case and that at bar wherein the actual control preparatory to taking began on board the "Collingswood".

Respondent urges (Brief p. 7) that international law has nothing to do with this case. Petitioner in its main brief (p. 31) directs the Court's attention to the well settled principles of law that the law of nations is treated as part of the law of the land and that our courts will take judicial notice of the law of nations. In petitioner's main brief (p. 17) there is set forth an excerpt from the opinion of the Board of Commissioners in the *Neptune* case. The following is stated therein with respect to the contention of the British government that it was obligated to pay only the original cost of the requisitioned goods of a neutral alien:

> "The law of nations, as derived from the general principles of justice and equity, states a different doctrine."

It is clear that international law bears a reciprocal relation to municipal law, and its principles of equity and justice, rooted in municipal law, have pertinent and significant applicability to the issues herein.

In International Law (chiefly as interpreted and applied by the United States) by Charles Cheney Hyde (formerly solicitor for the Department of State of the United States), there is stated with respect to the law of nations (Vol. 1, Sec. 5, p. 17):

> "* * * Normally, it is taken for granted that international law prevails throughout the domain of a State and will be respected in the course of all the activities of its several agencies. This is true in the case of the United States. Its tribunals, and in particular the Supreme Court, are reluctant to impute to the Congress or the Executive an intention to violate the law of nations. Moreover, those tribunals when unrestricted by statutory limitations, apply and enforce the principles of international law as a part of the law of the land."

It would appear that the expressions of opinion of counsel for the respondent (wholly unsupported by any authority whatsoever) clash sharply with the conclusions (based upon solid precedent) expressed by various Chiefs of Section in the Department of Justice whose principal function is the protection of the rights of the respondent in connection with the expropriation of property.*

In the treatise mentioned in the footnote the learned authors recognize the impact of international law upon the courts of the United States. It is said in the treatise (pp.

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* See *Acquisition of Property for War Purposes* prepared in the Department of Justice, Lands Division, United States Government Printing Office, Washington, 1944.

11-12):

"b. How Far International Law is Binding as Authority in the Courts of the United States

"To what extent international law is binding upon the United States is a question which cannot be answered without a little qualifying explanation.

"Congress by enacting certain limited special jurisdictional statutes authorizing the Court of Claims to take cognizance of certain designated claims which had arisen under international law has at times directly recognized international obligations. Ratification of a treaty by the United States generally necessitates a recognition of international rights and duties. The executive branch of the Government, too, has often claimed rights under international law and at times has acknowledged obligations thereunder.

"The Constitution of the United States, in express language, recognizes but not does not define international law, 'the law of nations,' or deal with its relation to domestic law.

"From the standpoint of what actually happens in international relations it may be said that international law cannot be abrogated by domestic legislation, and in event of violation it may perchance be enforced against the violators by the aggrieved nation or nations through such international sanctions as reprisal or war.

"From the standpoint, however, of to what extent international law will be enforced as law in the domestic courts of the United States, the answer is in one respect very different. Congress may effectively legislate otherwise.

"International law is usually recognized as part of our domestic law to be applied by the courts in cases before them in regard to matters to which it is found applicable. The theory most commonly underlying

such decisions has been that international law is part of the common law. At any rate, as a rule of law for application in our courts, it is subject, like other parts of our domestic law, to change by competent legislative authority. Sensing that departures from international law readily provoke international complications our courts have gone to great lengths to find through interpretation that no conflict was intended between an act of Congress or an executive regulation and the law of nations. Our courts, however, have refused to find in international law a binding legal obligation for enforcement in our courts, either under the Constitution or under any theory of higher law, where Congress has disallowed such obligation.

"c. The Authoritative Source Materials of International Law

"In ascertaining what the rule of international law is on any particular point, in the absence of treaty or controlling executive or legislative act or judicial decision, great weight has traditionally been attributed by the courts to the works of jurists or commentators, who by years of labor, research, and experience, have made themselves peculiarly well acquainted with this subject matter.

"d. The Present Crisis in International Law

"In recent years the totalitarian aggressor nations, repudiating all obligations under traditionally received international law, have in practice asserted that military might alone is in itself a complete justification for the conquest and enslavement of other nations. Meanwhile, they have demanded meticulous observance by their victims of the traditional rules of the self-same international law which they themselves openly flout. International law, like democratic government and popular liberty, therefore, clearly now is

> in a stage of crisis. Its survival, like theirs, will be largely dependent upon victory by the United Nations."

See also: Acquisition of Property for War Purposes, pages 35, 86, 98.

As indicated above, it was competent for the Congress to legislate upon the subject of a possible conflict between the law of nations and an Executive act or Congress' own legislation. (*The Peterhoff*, 5 Wall. 28, 52; Hyde, *The Supreme Court of the United States as an Expositor of International Law*, 1937; *18 British Year Book of International Law; The Sally*, 8 Cr. 382, 384; *The Adeline*, 9 Cr. 244, 284; *The Hampton*, 5 Wall. 372; *Prize Cases*, 2 Black 635.) But the statute under which the requisition was made contained no restriction upon the invocation by this Court of established principles of the law of nations. While counsel for respondent airily dismisses the implications of the effect of the law of nations, it is noteworthy that the writers of the treatise referred to said (p. 11):

> "The Constitution of the United States, in express language, recognizes but does not define international law 'the law of nations' or deal with its relation to domestic law."

It is submitted that to the extent that the court feels that international law does have its impact upon the facts presented, all of the authorities are in unison upon the award of damages to petitioner upon the theory claimed by it and all of the decisions of international tribunals which we have found support holdings against the doctrine advanced by respondent.

We submit it is pertinent to direct attention to respondent's position in connection with the expropriation by the Mexican government of the petroleum holdings of Amer-

ican companies. In a Note of April 3, 1940 to the Mexican government, respondent said:

> "The right to expropriate property is 'coupled with and conditioned on the obligation to make adequate, effective and prompt compensation' "

and that

> "The legality of the expropriation is in effect dependent on the observance of this requirement."

(*The International Law Quarterly,* Vol. 3, No. 4, October, 1950, p. 524.)

The learned author of the article just referred to said further (p. 524):

> "There is authority in international law for the view that foreign nationals are entitled to an international minimum standard of equitable compensation" (citing Fachiri: 'Expropriation and International Law', *6 British Year Book of International Law,* pp. 159-160 (1925))
>
> "Equality of treatment of nationals and non-nationals is rarely satisfactory to the foreign claimant."

Having regard to the fact that it emerges from the record that the "Collingswood" and its cargo were at all times under the control of the respondent, that the tin was ordered into warehouse by the respondent, that the import into the United States was directed by respondent and the subsequent requisitioning took place under circumstances that petitioner's goods were attempted to be subjected by force to our jurisdiction and our laws, we submit that such taking was in violation of elementary principles of international law. There was a clear interference by respondent with petitioner's right to clear its goods through our ports for transshipment.

See:

Royal Holland Lloyd v. *United States, supra,* p. 738.

Respondent's refusal to permit the shipment to continue on to Argentina pursuant to the through bill of lading was in violation of elementary principles.

In the treatise above referred to "Acquisition of Property for War Purposes", the learned authors who collaborated on the paper stated (p. 35):

"g. The Measure of Damages for Violation

"If expropriation of the property of aliens is in the given circumstances justified under international law it is not regarded as a wrong though the given situation, like condemnation under domestic law, may be one which gives rise to an obligation to make compensation. *In such cases the compensation required is reckoned on the basis of the value of the property at the time of the taking.* (Herz, *Expropriation of Foreign Property* (1941), 35 Am. J. Int. L. 243, at p. 253, *et seq.* For discussion of the range of problems involved in dealing with "acts of state" see Mann, *Sacrosanctity of the Foreign Act of State* (1943), 59 Law Q, Rev. 42, 155. Cf. *Underhill* v. *Hernandez,* 168 U. S. 250 (1897)). If the taking is in violation of international law, however, the damages awarded under international law in recent times cover not only the value of the property taken, but also the consequential damages suffered because of the taking, including loss of profits, etc., in order so far as practicable to compensate for the entire loss suffered. (Underscoring ours.) (*The Chorzow Factory Case, Publications of Permanent Court of International Justice,* series A, No. 17; same case in *World Court Reports,* vol. 1, 1922-1926, Edited by Manley O. Hudson,

Reported case No. 16, pp. 475-719; Wise, *Tort at International Law* (1923), 17 Am. J. Int. L. 245, Herz, *Expropriation of Foreign Property* (1941), 35 Am. J. Int. L., 243 at p. 253, *et seq.* See also, for more general discussion, Yntema, *The Treaties with Germany and Compensation for War Damage; The Measure of Damages in International Law* (1924), 24 Colum. L. Rev. 134.)" (Italics ours.)

CONCLUSION

The petitioner's application for a writ of certiorari directed to the Court below should be granted.

Respectfully submitted,

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